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Pattern of Violations; Final Rule

DEPARTMENT OF LABOR**Mine Safety and Health Administration****30 CFR Part 104**

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Pattern of Violations**AGENCY:** Mine Safety and Health Administration, Labor.**ACTION:** Final rule.

SUMMARY: The Mine Safety and Health Administration (MSHA) is revising the Agency's existing regulation for pattern of violations (POV). MSHA has determined that the existing regulation does not adequately achieve the intent of the Federal Mine Safety and Health Act of 1977 (Mine Act) that the POV provision be used to address mine operators who have demonstrated a disregard for the health and safety of miners. Congress included the POV provision in the Mine Act so that mine operators would manage health and safety conditions at mines and find and fix the root causes of significant and substantial (S&S) violations, protecting the health and safety of miners. The final rule simplifies the existing POV criteria, improves consistency in applying the POV criteria, and more effectively achieves the Mine Act's statutory intent. It also encourages chronic safety violators to comply with the Mine Act and MSHA's health and safety standards.

DATES: The final rule is effective on March 25, 2013.

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Availability of Information

Access rulemaking documents electronically at <http://www.msha.gov/reginfo.htm> or <http://www.regulations.gov> on the day following publication of this notice in the **Federal Register**.

I. Executive Summary*A. Purpose of the Regulatory Action*

Congress enacted the pattern of violations (POV) provision to provide MSHA with an additional enforcement tool, when other tools had proven ineffective. The final rule implements the statutory and legislative intent that safe and healthful conditions be restored at noncompliant mines.

This rule will have both quantitative and qualitative benefits and will reduce accidents, injuries, and fatalities in mines. This final rule is responsive to recommendations in the Office of the Inspector General's Report (OIG Report) on MSHA's implementation of its POV authority. The safety and health conditions that led to the accident at the Upper Big Branch (UBB) mine on April 5, 2010, further demonstrated the need to revise the POV regulation.

The POV final rule is one of MSHA's highest priority regulatory initiatives. It strengthens MSHA's ability to focus on those mine operators who demonstrate a disregard for the health and safety of miners through a recurring pattern of significant and substantial (S&S) violations. This final rule allows MSHA to focus on the most troubling mines, provide those operators with notice that they are out of compliance, and review their health and safety conditions until they are improved. This rule will not affect the vast majority of mines that operate in compliance with the Federal Mine Safety and Health Act of 1977 (Mine Act).

Congress intended that MSHA act quickly to address mines with recurring safety and health violations. MSHA's existing POV regulation limits the Agency's effective use of the POV provision, resulting in delays in taking action against chronic violators and depriving miners of necessary safety and health protections.

B. Summary of Major Provisions

The final rule simplifies the existing POV criteria, improves consistency in applying the POV criteria, and increases the efficiency and effectiveness in issuance of a POV notice. The final POV rule:

- Retains the existing regulatory requirement that MSHA review all mines for a POV at least once each year;
- Eliminates the initial screening and the potential pattern of violations (PPOV) notice and review process;
- Eliminates the existing requirement that MSHA can consider only final orders in its POV review;
- Like the existing rule, establishes general criteria that MSHA will use to identify mines with a pattern of

significant and substantial (S&S) violations;

- Provides for posting, on MSHA's Web site, the specific criteria (e.g., the number or rate of S&S violations) that MSHA will use in making POV determinations. This is consistent with existing practice; and

- Mirrors the provision in the Mine Act for termination of a POV.

In addition, in response to commenter concerns, the preamble to the final rule addresses:

- MSHA's Monthly Monitoring Tool for Pattern of Violations that operators can use to monitor their compliance performance;
- MSHA's commitment to requesting stakeholder input to revisions of the specific criteria; and
- MSHA's response to commenters' due process concerns;

(1) Operator can submit a corrective action program;

(2) Operator can request a meeting with the District Manager to discuss discrepancies in MSHA data; and

(3) Operator can request expedited temporary relief from a POV closure order.

C. Projected Costs and Benefits

This rule is not economically significant. Net benefits are approximately \$6.7 million. Total annualized benefits are \$12.6 million and total annualized costs are \$5.9 million. The final rule will not have a significant economic impact on a substantial number of small mining operations.

MSHA estimates that the final rule will prevent 1,796 non-fatal and non-disabling injuries over 10 years.

MSHA expects that qualitative benefits will:

- Encourage chronic violators to more effectively and quickly comply with safety and health standards;
- Provide for a more open and transparent process;
- Promote a culture of safety and health at mines and hold operators more accountable; and
- Simplify MSHA's procedures to improve consistency.

II. Background*A. Statutory Provision*

In enacting the Federal Mine Safety and Health Act of 1977 (Mine Act), Congress included the pattern of violations (POV) provision in section 104(e) to provide MSHA with an additional enforcement tool to protect miners when the mine operator demonstrated a disregard for the health and safety of miners. The need for such

a provision was forcefully demonstrated during the investigation of the Scotia Mine disaster, which occurred in 1976 in Eastern Kentucky (S. Rep. No. 181, 95th Cong., 1st Sess. at 32). As a result of explosions on March 9 and 11, 1976, caused by dangerous accumulations of methane, 23 miners and three mine inspectors lost their lives. The Scotia Mine had a chronic history of persistent, serious violations that were repeatedly cited by MSHA. After abating the violations, the mine operator would permit the same violations to recur, repeatedly exposing miners to the same hazards. The accident investigation showed that MSHA's then existing enforcement program had been unable to address the Scotia Mine's history of recurring violations.

The Mine Act places the responsibility for ensuring the health and safety of miners on mine operators. The legislative history of the Mine Act emphasizes that Congress reserved the POV provision for mine operators with a record of repeated significant and substantial (S&S) violations. Congress intended the POV provision to be used for mine operators who have not responded to the Agency's other enforcement efforts. The legislative history states that Congress believed that the existence of a pattern would signal to both the mine operator and the Secretary that "there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient" (S. Rep. No. 181, *supra* at 33).

The Mine Act does not define pattern of violations. Section 104(e)(4) authorizes the Secretary "to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." Congress provided the Secretary with broad discretion in establishing these criteria, recognizing that MSHA may need to modify the criteria as experience dictates.

B. Regulatory History

MSHA proposed a POV regulation in 1980 (45 FR 54656). That proposal included: purpose and scope, initial screening, pattern criteria, issuance of notice, and termination of notice. Commenters were generally opposed to the 1980 proposal and it was never finalized.

On February 8, 1985 (50 FR 5470), MSHA announced its withdrawal of the 1980 proposed rule and issued an advance notice of proposed rulemaking (ANPRM) that addressed many of the concerns expressed about the 1980 proposal. In the 1985 ANPRM, MSHA

stated that it intended to focus on the health and safety record of each mine rather than on a strictly quantitative comparison of mines to industry-wide norms. In the ANPRM, MSHA stated that the Agency envisioned simplified criteria, focusing on two principal questions:

- Were S&S violations common to a particular hazard or did S&S violations throughout the mine represent an underlying health and safety problem?

- Is the mine on a § 104(d) unwarrantable failure sequence, indicating that other enforcement measures had been ineffective?
- MSHA requested suggestions for additional factors the Agency should use in determining whether a POV exists and requested ideas on administrative procedures for terminating a pattern notice.

Based on the comments on the 1985 ANPRM, MSHA published a new proposed rule on May 30, 1989 (54 FR 23156), which included criteria and procedures for identifying mines with a pattern of S&S violations. The 1989 proposal included procedures for initial identification of mines developing a POV; criteria for determining whether a POV exists at a mine; notification procedures that would provide both the mine operator and miners' representative an opportunity to respond to the Agency's evaluation that a POV may exist; and procedures for terminating a POV notice. The 1989 proposal addressed the major issues raised by commenters on the 1980 proposal and the 1985 ANPRM. Commenters' primary concerns were MSHA's policies for enforcing the S&S provisions of the Mine Act, the civil penalty regulation, and MSHA's enforcement of the unwarrantable failure provision of the Mine Act. MSHA held two public hearings. After consideration of the information and data in the rulemaking record, MSHA issued a final rule on July 31, 1990 (55 FR 31128).

MSHA proposed revisions to its POV rule on February 2, 2011 (76 FR 5719). The Agency held five public hearings: June 2 in Denver, CO; June 7 in Charleston, WV; June 9 in Birmingham, AL; June 15 in Arlington, VA; and July 12 in Hazard, KY. MSHA also extended the comment period three times to April 18, June 30, and August 1, 2011.

C. Enforcement History

Until mid-2007, POV screening was decentralized; MSHA District offices were responsible for conducting the required annual POV screening of mines. Following the accidents at the Sago, Darby, and Aracoma mines in

2006, MSHA developed a centralized POV screening process.

MSHA initiated a newly developed "Pattern of Violations Screening Criteria and Scoring Model" in mid-2007, using a computer program based on the screening criteria and scoring model to generate lists of mines with a potential pattern of violations (PPOV). In late 2009, MSHA determined that the Agency needed to revise its POV regulation and placed Part 104—Pattern of Violations on the Agency's 2010 Spring Semi-annual Regulatory Agenda. The safety and health conditions at the Upper Big Branch (UBB) mine that led to the accident on April 5, 2010, further demonstrated the need to update the POV regulation. As one commenter stated, the UBB mine avoided being placed on a POV despite an egregious record of noncompliance.

In order to increase transparency, the Agency also created a user-friendly, "Monthly Monitoring Tool for Pattern of Violations" (on-line Monthly Monitoring Tool) that provides mine operators, on a monthly basis, a statement of their performance with respect to each of the PPOV screening criteria posted on MSHA's Web site.

Prior to MSHA's creation of the on-line Monthly Monitoring Tool, mine operators had to track each mine's compliance performance and calculate the statistics to determine whether the mine met each of the specific screening criteria. Many mine operators relied on MSHA to issue a PPOV notice. Now, with MSHA's on-line Monthly Monitoring Tool, they do not have to calculate the statistics. Operators, including those that own multiple mines, can easily monitor their performance.

MSHA's on-line Monthly Monitoring Tool is quick and easy to use; it does not require extra skill or training. To use the on-line Monthly Monitoring Tool, mine operators enter their mine ID number, view their mine's performance, and see whether that performance triggers the applicable threshold for each of the screening criteria. The mine operator:

- (1) Goes to MSHA's Web site at <http://www.msha.gov>;
- (2) Goes to the Pattern of Violations Single Source Page;
- (3) Enters the mine ID number under the "Monthly Monitoring Tool for Pattern of Violations;" and
- (4) Clicks on the "Search" button.

The on-line Monthly Monitoring Tool reports results in clear, color-coded indicators of the mine's performance (red YES = meets criterion, green NO = does not trigger criterion) for each criteria and a mine's overall performance.

In 2010, the U.S. Department of Labor's Office of the Inspector General (OIG) audited MSHA's POV program. On September 29, 2010, the OIG published its audit report titled, "In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority" (Report No. 05-10-005-06-001). The OIG found that the existing POV regulation created limitations on MSHA's authority that were not present in the Mine Act, specifically,

- Requiring the use of final citations and orders in determining a PPOV, and
- Creating a PPOV warning to mine operators and a subsequent period of further evaluation before exercising its POV authority.

The final rule allows MSHA to focus on the most troubling mines that disregard safety and health conditions and will not affect the vast majority of mines, which operate substantially in compliance with the Mine Act.

III. Section-by-Section Analysis

A. § 104.1 Purpose and Scope

Final § 104.1 provides the purpose and scope of the rule and is substantively unchanged from the existing provision.

Commenters suggested that the scope be changed to exclude those mines with effective safety and health management programs that have already demonstrated proactive measures to protect the health and safety of miners. Other commenters suggested that MSHA exempt salt mines that have an exemplary record of safety.

Consistent with the Mine Act, the final rule covers all mines. MSHA acknowledges, however, that the majority of mine operators are conscientious about providing a safe and healthful work environment for their miners. The POV regulation is not directed at these mine operators. Consistent with the legislative history, it is directed at those few operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards issued under the Mine Act. The final rule addresses situations where a mine operator allows violations to occur and hazardous conditions to develop repeatedly without taking action to ensure that the underlying causes of the violations are corrected.

B. § 104.2 Pattern Criteria

Like the proposal, final § 104.2 combines existing §§ 104.2 and 104.3 into a single provision. In combining existing §§ 104.2 and 104.3, the final rule eliminates the initial screening review process and the PPOV

notification. Like the proposal, the final rule eliminates the requirement that MSHA consider only final orders when evaluating mines for a POV. Final § 104.2 specifies the general criteria that MSHA will use to identify mines with a POV. The final rule simplifies the process for determining whether a mine has a POV and more accurately reflects the statutory intent.

1. § 104.2—Elimination of Potential Pattern of Violations Initial Screening and Notification

Final § 104.2, like the proposal, does not include a provision for a PPOV. Commenters in support of eliminating the PPOV stated that mine operators should know the details of their compliance history; there is no need for MSHA to warn an operator in advance that a mine may be subject to enhanced enforcement measures. Commenters said that eliminating the PPOV process would remove the incentive for mine operators to make just enough short-term improvements to get off the PPOV list, but then backslide and wait for MSHA to issue the next PPOV notice. Commenters stated that the elimination of the PPOV process should serve to effect greater improvements for more miners, at more operations, and on a longer-term basis.

Many commenters opposed the proposed elimination of the PPOV process. These commenters stated that elimination of the PPOV provisions denies mine operators their constitutional rights to adequate notice and a fair opportunity to be heard before MSHA issues one of its toughest sanctions. They also stated that elimination of the PPOV process further aggravates the impact of basing POV decisions on violations issued rather than on final orders.

Many commenters stated that eliminating the existing PPOV notice worsens the impact of any inaccurate data on which the POV is based. Some commenters stated that self-monitoring is unlikely to result in the prompt action that a PPOV notice would have triggered. Some stated that the problem in relying on self-monitoring is that MSHA and mine operators often reach different conclusions based on the same data. In their view, the existing PPOV notice process is straightforward and provides an opportunity for mine operators to address differences with MSHA. Some commenters stated that the elimination of PPOV also eliminates an element of transparency, as well as any chance of discussing the basis for the POV with MSHA before suffering loss due to inaccurate information or data.

Commenters pointed out that 94 percent of mine operators who received the PPOV notice reduced their S&S citations by at least 30 percent and 77 percent reduced S&S citations to levels at or below the national average for similar mines. These commenters stated that the initial screening is effective in identifying poor performance. Some said that the PPOV process has been effective at rehabilitating a significant number of problem mines and should not be changed. Commenters urged MSHA to focus efforts on those few mine operators who fail to improve performance, to not eliminate a program that allows mine operators and MSHA to work together, and to retain the existing two-step process.

Beginning in June 2007 through September 2009, MSHA conducted seven cycles of PPOV evaluations, on an average of every 6 to 9 months. In each cycle, eight to 20 of all mines met the criteria for issuance of a PPOV. During that period, MSHA sent 68 PPOV letters to 62 mine operators (six mine operators received more than one notification). After receiving the PPOV, 94 percent of the mines that remained in operation to the next evaluation reduced the rate of S&S citations and orders by at least 30 percent, and 77 percent of the mines reduced the rate of S&S citations and orders to levels at or below the national average for similar mines. These improvements declined over time at some mines. Compliance at 21 percent ($13/62 = 0.21$) of the 62 mines that received PPOV letters deteriorated enough over approximately a 24-month period to warrant a second PPOV letter (MSHA Assessment data). Six of these mines were actually sent a second PPOV letter, while the other seven (of the 13) could have received a second letter but did not, generally due to mitigating circumstances. MSHA believes that the final rule will result in more sustained improvements in mines that may have conditions that approach the POV criteria.

Commenters stated that MSHA already possesses the graduated enforcement tools necessary to shut down all or any part of unsafe operations through the use of unwarrantable failure to comply, imminent danger, and other elevated enforcement actions. Commenters also stated that MSHA fell short by not requiring mines receiving a PPOV to make fundamental safety process changes as part of their corrective actions. Commenters recognized that long-term continuous safety improvement requires fundamental changes in an organization's culture,

performance processes, and safety leadership.

Some commenters stated that elimination of PPOV places a greater burden on small, remote mine operators that do not have computers or internet access. These operators will likely be unable to access the MSHA on-line databases on a timely basis to track their compliance performance. One commenter stated that MSHA should continue to provide written notification to mines in danger of establishing a pattern of violations unless a company requests that it not be sent.

MSHA's existing POV rule was developed before the widespread use of the Internet or even computers in many mines. Now, with MSHA's on-line Monthly Monitoring Tool, operators, including those that own multiple mines, can easily and frequently monitor their compliance performance. MSHA believes that the final rule is an improvement over the PPOV screening process in the existing regulation. The final rule encourages mine operators to continually evaluate their compliance performance and respond appropriately. Through MSHA's on-line Monthly Monitoring Tool, mine operators now have information readily available regarding each mine, the level of violations compared with the criteria, and an indication of whether the mine in question has triggered one of the POV criteria. This information eliminates uncertainty surrounding POV status and the need for MSHA to inform mine operators of a PPOV, since mine operators are able to access that information at any time. In addition, MSHA does not believe that eliminating the PPOV notice poses a burden on mine operators who may not have access to a computer or the internet. In the rare situations where mine operators do not have access to a computer or the internet, they may request periodic POV status updates from MSHA and the Agency will provide this information to them at no cost. Alternatively, MSHA can assist small or remote mine operators by providing them this information at the opening conference of each inspection visit.

Mine operators are responsible for operating their mines in compliance with all applicable standards and regulations. The on-line Monthly Monitoring Tool, which is currently available, will continue to provide mine operators, on a monthly basis, their performance status relative to the POV screening criteria posted on MSHA's Web site. MSHA developed the on-line Monthly Monitoring Tool based on feedback from the mining industry. MSHA conducted a stakeholder meeting

prior to announcing the implementation of the "Monthly Monitoring Tool for Pattern of Violations" on April 6, 2011. At this meeting, MSHA demonstrated use of the on-line Monthly Monitoring Tool. The POV Single Source Page at <http://www.msha.gov/POV/POVsinglesource.asp> contains the Monthly Monitoring Tool; Pattern of Violations Screening Criteria; Pattern of Violations (POV) Procedures Summary; a copy of the applicable regulations; and contact information to request assistance. MSHA receives and responds to requests for information about the screening criteria, the procedures, and mine-specific data related to the POV procedures and will continue to do so.

Using the enforcement data and specific POV criteria on MSHA's Web site, mine operators can perform the same review of their compliance and accident data as MSHA. MSHA's on-line Monthly Monitoring Tool is self-effectuating, quick, and easy to use; it does not require extra skill or training, technical assistance, or interpretation. Indeed, MSHA data indicate that operators are already making frequent use of the tool—there are nearly 2,200 hits per month on the on-line Monthly Monitoring Tool on the POV single source page.

Elimination of PPOV underscores the mine operators' responsibility to monitor their own compliance records and encourages them to verify that the information on MSHA's Web site is accurate. This is consistent with the Mine Act's premise that the mine operator has the authority, control, and primary responsibility for the health and safety conditions at their mines.

As stated earlier, the OIG concluded, and MSHA agrees, that the existing PPOV and final order provisions are impediments to MSHA's POV authority that were not required by the Mine Act. Experience has shown that the existing PPOV provision created the unintended consequence of encouraging some mine operators to achieve short-term improvements instead of adopting systemic, long-term improvements in their health and safety management culture. MSHA believes that eliminating the initial screening and PPOV provisions will create an additional incentive for mine operators to address the root causes of recurrent S&S violations and will facilitate long-term compliance at mines with a repeated history of S&S violations. Based on the Agency's experience under the existing regulation, MSHA has concluded that incentivizing greater use of the on-line Monthly Monitoring Tool by mine

operators facilitates a more proactive approach to health and safety.

2. § 104.2—Elimination of the Final Order Requirement

Final § 104.2 eliminates existing § 104.3(b), which provides that—

Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential pattern of violations under this section.

As discussed in the proposal, the final order requirement has proven itself to be an impediment to MSHA's use of section 104(e) of the Mine Act as contemplated by Congress. Given the number of cases pending before the Federal Mine Safety and Health Review Commission (Commission), the final order requirement limits MSHA's ability to consider a mine's recent compliance record when it evaluates mines for a POV. For example, at the end of CY 2005, there were approximately 1,000 citations and orders in contest. Currently, the number of open contested cases is 10,730 containing close to 59,000 citations and orders. The amount of time required to litigate these cases increased in each year from CY 2006 through CY 2011, increasing from an average of 214 days (7 months) from contest to decision in CY 2005 to 601 days (20 months) in CY 2011. The final rule removes this impediment by eliminating the requirement to consider only final orders and aligns the POV provision with the intent of the Mine Act.

Several commenters supported MSHA's proposal to eliminate the final order requirement. Some agreed with MSHA's conclusion that the existing regulation impedes MSHA's ability to use the POV enforcement tool in the manner intended by Congress. Some commenters stated that the final order requirement makes it impossible to use the POV tool to address serious current health and safety problems at mines. They stated that by the time a citation becomes final, the health and safety conditions at the mine may bear no relationship to what they were when the hazard was originally identified and cited.

Commenters supporting elimination of the final order requirement stated that the plain language of the Mine Act and its legislative history do not require MSHA to rely on final orders when identifying a pattern of violations. These commenters stated that the language of the Mine Act and its legislative history support MSHA's decision to consider citations and orders as issued, rather

than final orders, when determining whether a mine has demonstrated a pattern of S&S violations. The commenters cited portions of the legislative history where Congress made clear that it intended MSHA to use the pattern sanction simultaneously with other provisions of the Act when it is necessary to bring a mine into compliance. The commenters agreed with MSHA's conclusion that the final order requirement interferes with MSHA's ability to use the pattern sanction in conjunction with the Mine Act's other enforcement provisions.

Based on Agency experience with the existing regulation, the final rule, like the proposal, includes all citations and orders issued by MSHA in the Agency's POV determination. This is consistent with the language, legislative history, and purpose of the Mine Act's POV provision. Section 104(e)(1) of the Mine Act states that an operator shall be given a POV notice—

* * * if it has a pattern of violations of mandatory health or safety standards. * * * which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards. (30 U.S.C. 814(e)(1))

Nothing in section 104(e) of the Mine Act or the legislative history states that POV determinations may only be based on final citations and orders.

Not only does the language of section 104(e) contain nothing that prohibits the Secretary from basing POV determinations on non-final citations and orders, but section 104(e)(4) explicitly provides that the Secretary "shall make such rules as [s]he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists".

Because Congress explicitly delegated to the Secretary the authority to establish POV criteria, and because nothing in the language of section 104(e) explicitly limits the Secretary's discretion to base POV determinations on non-final citations and orders, the Secretary's interpretation that she may do so must be given "controlling weight" (*Eagle Broadcasting Group LLC v. FCC*, 563 F.3d 543, 551–52 (D.C. Cir. 2009)).

The elimination of the final order provision in the final rule is also consistent with the legislative history. The Senate Report accompanying the Mine Act states that section 104(e) was enacted in response to the Scotia mine disaster, an accident that "forcefully demonstrated" the need for such a provision (S. Rep. No. 181, 95th Cong., 1st Sess. 32, reprinted in Legislative

History of the Federal Mine Safety and Health Act of 1977). The Report noted that the Senate's investigation of that disaster revealed that—

* * * the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. (Id. at 32)

The Senate Report's use of the phrase "inspection history" rather than the phrase "violation history" indicates Congress' intent that POV determinations should be based on inspection histories, i.e., findings by the Secretary of violations during inspections, rather than only on adjudicated violations.

The Senate Report also specifically referenced the similarities between section 104(e) and 104(d) of the Mine Act and stated that the POV sequence parallels the existing unwarrantable failure sequence (Id. at 33). That statement reflects Congress' intent that POV determinations, like section 104(d)(1) and (2) withdrawal orders, should be based on non-final citations and orders.

In addition, the Senate Report stated that the Secretary have both section 104(d) and 104(e) enforcement tools available for use simultaneously if the situation warrants (Id. at 34). Congress specifically indicated its intent that the Secretary use the POV enforcement tool as a last resort when other enforcement tools (available to the Secretary) fail to bring an operator into compliance. This underscores Congress' intent that all enforcement tools be used together, and in the same manner, that is, use of issued citations and orders, as opposed to final orders.

Finally, the Senate Report emphasized Congress' intention that the Secretary have "broad discretion" in establishing criteria for determining when a pattern exists, and that the Secretary continually evaluate and modify the POV criteria as she deems necessary (Id. at 33). This specific grant of discretion to the Secretary supports the Agency's action in the final rule to eliminate the use of only final orders in making a POV determination. The final rule supports the enforcement structure in the Mine Act that the Secretary use non-final citations and orders as the basis for section 104(e) withdrawal orders.

Interpreting section 104(e) to permit the Secretary to rely on non-final citations and orders in determining POV status is consistent with the purpose of section 104(e)—protecting miners working in mines operated by habitual

offenders whose chronic S&S violations have not been deterred by the Secretary's other enforcement tools. The Secretary has determined that the final order requirement in the existing rule has prevented the Secretary from using section 104(e) as the effective enforcement tool that Congress intended. Some S&S citations and orders do not reach the final order stage for years.

The average number of days from contest to disposal (the time it currently takes for a typical citation to make it all the way through the appeals process) was 534 days in calendar year 2011 (about 1.5 years). The number of citations disposed of in less than two years was 131,000 (or 82%). Fourteen percent were disposed of within two to three years, 3% were disposed of within three to four years, and 1% were disposed of in four or more years.

The contest rate for S&S violations increased greatly following MSHA's revision of its civil penalty regulations in 2007, pursuant to the Mine Improvement and New Emergency Response Act (MINER Act) of 2006. The backlog of contested cases at the FMSHRC has grown so large that even with an increase in the numbers of cases disposed of in 2011, final orders may not be issued for two or three years. As stated by one commenter, the delay caused by the backlog allows POV sanctions to be postponed or avoided altogether. This often leaves the Secretary unable to base POV determinations on mine operators' recent compliance history—no matter how egregious that history may be. Interpreting section 104(e) to permit the Secretary to base compliance determinations on non-final citations or orders will allow the Secretary to protect miners working in mines where there is a recent history of S&S violations and where the mine is operated by habitual offenders who have been undeterred by other enforcement sanctions—precisely the type of circumstances section 104(e) was intended to correct.

Many commenters opposed the Agency's proposal to eliminate the final order requirement. Some stated that the proposal violates mine operators' due process rights under the Fifth Amendment to the United States Constitution. Commenters stated that the use of violations issued to trigger punitive POV sanctions without a meaningful opportunity for prior independent review, together with the proposed rule's elimination of the PPOV provisions, denies mine operators the constitutional right to notice and the opportunity to be heard.

Commenters who opposed elimination of the final order requirement were concerned with the possibility of the erroneous deprivation of property that may occur without adequate procedural protections. They stated that the property interest at stake—the economic viability of a mine—is so jeopardized by the threat of the POV sanction that MSHA must provide maximum protection to mine operators before it exercises POV authority. Some commenters stated that the proposed rule, as written, does not provide adequate procedural protections. They cited cases from the U.S. Supreme Court and other federal courts to support their position that due process requires MSHA to provide notice and a hearing to mine operators before imposing the POV sanction.

MSHA does not agree with commenters who stated that elimination of the PPOV and final order provisions violate mine operators' due process rights under the U.S. Constitution. Citations and orders, together with notice of the POV criteria posted on the Web site, and the on-line Monthly Monitoring Tool, will provide sufficient notice to alert operators of the possibility that they may be subject to a POV. Under existing MSHA procedures, mine operators can discuss citations and orders with the inspector both during the inspection and at the closeout conference. They also can request a safety and health conference with the field office supervisor or the district manager to review citations and orders and present any additional relevant information. Additionally, mine operators who may be approaching POV status have the opportunity to implement a corrective action program, and MSHA considers a mine operator's effective implementation of an MSHA-approved corrective action program as a mitigating circumstance in its POV review.

The Supreme Court has held that adequate post-deprivation procedures are sufficient to satisfy due process where public health and safety are at stake. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 595–596 (1950) (affirming the FDA's seizure and destruction of mislabeled drugs as “misleading to the injury or damage of the purchaser or consumer” without the opportunity for a pre-deprivation hearing, even though the particular drugs seized were not hazardous); *Mackey v. Montrym*, 443 U.S. 1 (1979) (holding that a state law depriving drivers of their licenses on suspicion of operating under the influence of alcohol was constitutional without a pre-

deprivation hearing, due to the compelling interest in highway safety). Where prompt post-deprivation review is available to correct any administrative error, generally no more is required than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be. *Mackey, supra*, at 13.

The Mine Act guarantees due process for mine operators subject to MSHA enforcement actions. A mine operator may seek expedited temporary relief under section 105(b)(2) of the Mine Act from a pattern designation provided a withdrawal order is issued under section 104(e). Operators must have at least one withdrawal order in order to contest the pattern designation. Requests for temporary relief are reviewed within 72 hours and assigned to a Commission Administrative Law Judge as a matter of procedure, provided the request raises issues that require expedited review. The Mine Act's expedited review procedure satisfies the Constitution's due process requirements. *United Mine Workers v. Andrus*, 581 F.2d 888 (D.C. Cir. 1978).

The on-line Monthly Monitoring Tool will allow operators to review their compliance information on a monthly basis and bring to MSHA's attention any data discrepancies in the POV database as it is updated each month. Mine operators will have an opportunity to meet with District Managers for the purpose of correcting any discrepancies after MSHA conducts its POV screenings and issues a POV. As with all citations and orders issued under the Mine Act, mine operators have the right to contest any citation or order before the FMSHRC and operators may seek expedited review of a POV closure order.

3. § 104.2(a)—POV Review at Least Annually

Final § 104.2(a), like the existing rule, provides that MSHA will review the compliance records of mines at least once each year to determine if any mines meet the specific POV criteria posted on MSHA's Web site at <http://www.msha.gov/POV/POVsinglesource.asp>. The proposed rule would have increased the frequency of MSHA's review to at least twice per year. Commenters stated that the proposed provision for at least two reviews per year was unnecessary; MSHA can conduct multiple reviews per year under the existing rule, which provided for a POV review at least once a year. Some commenters stated that the

reviews should be automated and data adjusted essentially in real time so that MSHA could respond quickly, e.g., when an inspector issues an inordinately large number of citations during an inspection of a bad actor. Some commenters supported the proposed twice-a-year review, stating that more frequent reviews provide mine operators an incentive to monitor their compliance more closely.

After reviewing all comments, the final rule retains the once-a-year review in the existing rule. Under the final rule, the Agency could conduct more than one review a year if conditions warrant, as it has done under the existing rule.

4. § 104.2(a)(1) to (8)—General Pattern of Violations Criteria for MSHA Periodic Review

Final § 104.2(a), like the proposal, contains the criteria that MSHA will consider in evaluating whether a mine exhibits a POV. These criteria do not include numerical measures. MSHA will post the specific criteria, with numerical data, on the Agency's Web site at <http://www.msha.gov/POV/POVsinglesource.asp> for use by mine operators in evaluating their mine's performance. As stated during the proposed rulemaking, when MSHA revises the specific criteria, the Agency will post the revised specific criteria on the Agency's Web site for comment (see section III.B.7 of this preamble).

Multiple Violations

Commenters stated that MSHA seems to be basing POV determinations on multiple unrelated violations. They stated that a POV must be based on repeated violations of the same or related standards.

The Mine Act does not require that MSHA base POV decisions on repeated violations of the same or related standards. The pattern criteria in the existing regulation for a PPOV include repeated S&S violations of a particular standard or standards related to the same hazard that are final orders of the FMSHRC. Like the existing rule, under the final rule, MSHA will base POV decisions on a complete review of a mine's health and safety conditions, not only on repeated violations of the same or related standards as recommended by some commenters. MSHA believes that limiting the scope of the POV regulation to repeated violations of the same or related standards would unnecessarily hinder MSHA's ability to address chronic violators and would ignore the reality that, in dangerous safety situations there are often multiple contributing violations.

Length of Review Period

Some commenters stated that the review must be limited, e.g., to citations issued within the previous 2 years. Some commenters expressed concern that, because of the Commission's heavy case load, many citations could be adjudicated at the same time causing an unfair surge in citations in one review period. Some commenters stated that a mine's POV status can be threatened by a single inspection or a few inspections with few citations followed by one with a lot of citations. These commenters stated that MSHA should not be able to issue a POV notice based on only a few inspections, one of which had many citations. According to one commenter, in these situations, posting the specific criteria on a Web site does not warn a mine operator that the mine's compliance history is approaching a POV. In support of this position, the commenter provided an example of a mine operator undergoing one inspection and receiving a smaller number of S&S citations, followed by another inspection within the next several months with a much larger number of S&S citations.

MSHA will continue the existing policy of reviewing a mine's compliance history over a 12-month period of time. MSHA believes that this provides the best opportunity for the Agency to evaluate whether a mine has a POV. Under the final rule, mine operators have the responsibility to constantly monitor their compliance performance and to assure that health and safety conditions are addressed in a timely manner. MSHA suggests that mines receiving an inordinate number of S&S violations over a short period of time may need to develop a corrective action program designed to address the root causes of any recent increases in S&S citations.

Interpretation of Significant and Substantial (S&S)

Commenters also expressed concern about how MSHA interpreted S&S. Many commenters emphasized that the mine operator and MSHA inspector often disagree. Some stated that inexperienced or insufficiently trained inspectors mark many citations as S&S when there is no likelihood of an injury or illness, and no negligence. They stated that MSHA must clarify what constitutes an S&S violation.

MSHA's interpretation of what constitutes an S&S violation is posted on MSHA's Web site at <http://www.msha.gov/PROGRAMS/assess/citationsandorders.asp> and is consistent with the Federal Mine Safety and Health

Review Commission's definition of S&S (*Mathies Coal Co.*, 6 FMSHRC 1 (January 1984)). With respect to inspector training, MSHA is constantly updating and improving new inspector training, journeymen training, and supervisor training to improve consistency in the application of S&S. In addition, MSHA has implemented an improved pre-assessment conferencing process to facilitate early resolution of enforcement disputes that relate to S&S and other issues.

5. § 104.2(a)(7)—Other Information

Final § 104.2(a)(7), like the proposal, provides that MSHA will consider other information that demonstrates a serious safety or health management problem at the mine. It includes the information addressed in existing §§ 104.2(b)(2)–(b)(3) and 104.3(a)(1)–(a)(2). Under the final rule, this other information may include, but is not limited to, the following:

- Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations;
- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

Commenters were concerned that MSHA's consideration of other information in the POV review criteria gives the Agency almost limitless discretion to include anything the Agency wants to consider. Some stated that unless the basis for this determination is clearly defined, it is too broad and subjective.

Some commenters also stated that MSHA already possesses the authority to shut down a mine for a variety of reasons, such as an imminent danger or an unwarrantable failure to comply, and does not need the POV sanction to stop operations at dangerous mine sites. According to these commenters, in these situations, mine operators must immediately comply with the order and withdraw miners until the hazard is eliminated or the violation is abated, though the mine operator still has the right to challenge MSHA's issuance of the order. They stated that, in addition, MSHA can seek a restraining order in the appropriate federal district court under section 108(a)(2) of the Mine Act whenever the Agency believes that the

mine operator is engaged in a pattern of violations that constitutes a continuing hazard to the health or safety of the miners. For these reasons, commenters stated that MSHA has no basis to dispense with the notice and comment process in a manner contrary to due process and the statutory enforcement scheme of the Mine Act in exercising the Agency's POV authority. (See discussion on the elimination of the PPOV and final order provisions above in sections III.B.1. and 2. of this preamble.)

Other commenters were concerned that MSHA's consideration of injuries and illness might cause some mine operators to not report them. These commenters stated that MSHA should not penalize mine operators for reporting accidents, injuries, and illnesses by considering them in the Agency's POV review. These commenters stated that a pattern of injuries does not mean a pattern of violations and that injuries and illnesses are not well correlated either quantitatively or qualitatively with violations. MSHA data do not reveal a direct statistical correlation between citations and injuries. However, as a general matter, since passage of the Mine Act and MSHA's enforcement of health and safety standards at mines, annual mining fatalities and injuries have steadily declined. In 1977, there were 273 mining fatalities and 40,000 injuries. In 2011, there were 37 fatalities and less than 9,000 injuries. Moreover, among mines that have been placed on PPOV status in prior years, data generally show both a reduction in violations and a corresponding decrease in injuries in the year after mines were placed on that status.

One commenter stated that including injuries in POV determinations can only diminish the value of the POV in identifying truly dangerous mine operations. Another commenter stated that MSHA's data are unreliable because of underreporting and suggested that MSHA conduct a part 50 audit as part of a POV review. This commenter recommended that MSHA weigh heavily any information that shows a mine operator failed to report or is trying to cover up underreporting or violations.

Consistent with MSHA's position that the Agency will consider a variety of sources of information bearing on a mine's health and safety record when it conducts POV evaluations, this provision of the final rule restates the other information that the Agency may consider in determining whether a mine has a POV. MSHA data and experience show that violations of approval,

training, or recordkeeping regulations, for example, can significantly and substantially contribute to health or safety hazards, and may be a contributing cause of an accident. This is especially true where the mine operator allows similar violations to occur repeatedly. Under the final rule, MSHA intends to exercise its enforcement authority consistent with Agency experience and statutory intent.

6. § 104.2(a)(8)—Mitigating Circumstances

In this final rule, MSHA states what it considers mitigating circumstances and, based on its experience, provides more explanation for how the Agency considers mitigating circumstances in its POV decisions.

Many commenters stated that MSHA should provide more information about the role that mitigating circumstances play in the POV review process. Some commenters responded as though MSHA will issue a POV notice automatically if the criteria on the MSHA Web site are met. These commenters stated that final § 104.3 requires the District Manager to issue a pattern of violations notice when a mine has a pattern of violations; however, the discussion of mitigating circumstances states that MSHA has discretion to consider other factors before determining whether a POV notice is necessary. One commenter stated that the mining community needs to know more about what mitigating factors MSHA will consider and how the presence of mitigating factors could remove an operation from POV status. This commenter urged MSHA to consider only objective measures that demonstrate significant improvements in mine health and safety for mitigation purposes. This commenter was concerned that MSHA may relieve a mine operator from a POV determination based on short-term improvements without an objective commitment to long-term change. Other commenters stated that the proposed rule did not prescribe a specific procedure for MSHA consideration of mitigating circumstances prior to issuance of the POV notice. They requested that MSHA provide more information about the means for presenting mitigating information to the Agency and include the mechanism for this approach in the rule.

Under the existing rule, MSHA considers mitigating circumstances before issuing a POV notice. Under the final rule, this will not change; however, MSHA will no longer provide a notice to mine operators that a mine's violation history is approaching a pattern of S&S

violations. Under the final rule, the mine operator is responsible for knowing if the mine's violation history is approaching a pattern of S&S violations. As stated above, MSHA exercises caution and considers all relevant information, including any mitigating information, before it exercises its POV authority. There may be extraordinary occasions when a mine meets the POV criteria, but mitigating circumstances make a POV notice inappropriate. The mine operator will have to establish mitigating circumstances with MSHA before the Agency issues a POV notice. The types of mitigating circumstances that could justify a decision to not issue a POV notice, or to postpone the issuance of a POV notice to reevaluate conditions in the mine, may include, but are not limited to, the following:

- An approved and implemented corrective action program to address the repeated S&S violations accompanied by positive results in reducing S&S violations;
- A bona fide change in mine ownership that resulted in demonstrated improvements in compliance; and
- MSHA verification that the mine has become inactive.

MSHA will continue to consider only the enforcement record of the current operator of the mine in determining whether the mine meets the POV criteria. MSHA, in coordination with the Office of the Solicitor, when necessary, determines whether there has been a change in the mine operator that warrants the start of a new violation history at a mine. Mines that have undergone bona fide changes in ownership may have POV notices postponed while MSHA determines if the new owner is achieving measurable improvements in compliance. Mines at which POV enforcement actions have been postponed due to a change to inactive status will immediately be subject to further POV enforcement once the mines resume production.

Although the final rule does not establish a specific procedure for mine operators to present mitigating circumstances to MSHA prior to the issuance of a POV notice, mine operators can present information to support mitigating circumstances to the District Manager at any time. (See MSHA's discussion of its on-line Monthly Monitoring Tool, for monitoring a mine's compliance history, under section III.B.1. of this preamble.)

Corrective Action Program

Commenters misunderstood MSHA's use of the term "safety and health

program" in the proposed rule. Several commenters suggested that MSHA use another term, such as remedial plan or targeted remedial plan, to avoid confusion. One commenter stated that including comprehensive safety and health management programs in the final rule, as these programs are typically understood, will establish a detrimental precedent that safety and health programs are merely compliance. This commenter offered to support the development of expertise in MSHA staff so that MSHA could work cooperatively with mine operators approaching POV status to enable them to develop safety and health programs, stating that anything short of such a measure demeans the value of a safety and health program.

In response to comments, MSHA clarified in its notices of public hearings and its opening statements at the public hearings that the Agency did not intend that these safety and health management programs be the same as those referenced in the Agency's rulemaking on comprehensive safety and health management programs (RIN 1219–AB71). The public hearing notice further stated that MSHA would consider a safety and health management program as a mitigating circumstance in the pattern of violations proposal when it: (1) Includes measurable benchmarks for abating specific violations that could lead to a pattern of violations at a specific mine; and (2) addresses hazardous conditions at that mine. MSHA's use of the term "safety and health program" in relation to mitigating circumstances in the POV proposal is related to corrective action programs focused on reducing S&S violations at a particular mine. Further, MSHA clarified that its rulemaking on safety and health programs is a totally separate action, unrelated to the POV rulemaking. MSHA also stated that these programs referenced in the POV rulemaking would have to be approved by the Agency prior to the issuance of a POV notice. To avoid any confusion, the final rule uses only the term "corrective action program"; it does not address safety and health management programs at all.

MSHA will evaluate the mine operator's corrective action program to determine if it is structured so that MSHA can determine whether the program's parameters are likely to result in meaningful, measurable, and significant reductions in S&S violations. MSHA has guidelines for corrective action programs on the Agency's Web site at <http://www.msha.gov/POV/POVsinglesource.asp> under *Pattern of Violations (POV) Procedures*

Summary—2010, Appendix B—Guidelines for Corrective Action Programs. In general, programs must contain concrete, meaningful measures that can reasonably be expected to reduce the number of S&S violations at the mine; the measures should be specifically tailored to the compliance problems at the mine; and the measures should contain achievable benchmarks and milestones for implementation. More specific guidance is contained in the aforementioned document.

MSHA will consider an operator's effective implementation of an MSHA-approved corrective action program as a mitigating circumstance that may justify postponing a POV notice. Like the Agency's policy under the existing rule, the program must set measurable benchmarks for evaluating the program's effectiveness and show measurable improvements in compliance to warrant postponement of a POV notice.

Under the final rule, if a mine operator is close to meeting the POV criteria, the mine operator may submit to MSHA for approval a corrective action program to be implemented at the mine. If requested, MSHA will assist mine operators in developing an appropriate corrective action program.

7. § 104.2(b)—Specific Criteria

Final § 104.2(b), proposed as § 104.2(a), provides that MSHA will post, on its Web site at <http://www.msha.gov/POV/POVsinglesource.asp>, the specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations. MSHA has determined that posting the specific criteria on its Web site, together with each mine's compliance data, will allow mine operators to monitor their compliance records to determine if they are approaching POV status. In addition, mine operators, as well as other members of the public, can monitor the data to identify any inaccuracies and notify MSHA of such inaccuracies. As stated earlier, MSHA believes that it is the mine operator's responsibility to constantly monitor their compliance performance and to assure that health and safety conditions at their mines are proactively addressed. Access to the specific POV criteria and the compliance data provides mine operators the means to evaluate their own records and determine whether they are approaching the criteria levels for a POV. This access also enables mine operators to be proactive in implementing measures to improve health and safety conditions at their mines and to bring their mines into

compliance, which will enhance the health and safety of miners.

As stated in the proposed rule and at the public hearings, to provide transparency and to put operators on notice of how the Agency will determine if a mine has a POV, MSHA will continue to post specific criteria on the Agency's Web site. The specific criteria can be found at <http://www.msha.gov/POV/POVScreeningCriteria2011.pdf>. Further, as stated during the rulemaking, MSHA will seek stakeholder input when revising POV criteria. To involve stakeholders in the process of revising the specific criteria, MSHA will publish proposed changes on the Agency's Web site and solicit public comment. MSHA also will notify those on the Agency's email subscription list that the criteria are posted for comment. MSHA will consider revising the criteria based on comments.

The specific criteria are an important element in MSHA's POV evaluation process. MSHA agrees with the commenters who stated that the Agency may from time to time need to modify thresholds and other factors to assure mine operators of fair and equitable criteria that take into account different mine sizes, mine types, and commodities. The final rule retains the Agency's longstanding practice of developing specific criteria through policy and provides the flexibility to adapt the specific criteria as changing conditions and factors dictate.

MSHA considers the specific POV criteria on its Web site to be a discretionary statement of Agency policy. Posting the specific POV criteria on MSHA's Web site promotes openness and transparency by encouraging mine operators to examine their own compliance records more closely and ascertain whether they have recurring S&S violations. Many mine operators are currently monitoring their compliance performance against the specific criteria posted on MSHA's Web site.

In the preamble to the proposed rule, MSHA requested comments on how the Agency should obtain input from stakeholders during the development and periodic revision of the Agency's specific POV criteria and the best methods for notifying mine operators of changes to the specific criteria. MSHA also stated that the Agency plans to provide any change to the specific criteria to the public, via posting on the Agency's Web site, for comment before MSHA uses it to review a mine for a pattern of violations.

Some commenters opposed MSHA's proposed approach to revise the specific

criteria. Commenters stated that MSHA's POV screening criteria are not interpretive, are not a statement of policy, and do not constitute a logical outgrowth of the proposed rule. Instead, they stated that these criteria constitute rulemaking and require formal notice and comment under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). Some stated that the specific criteria must be clearly defined and published in the **Federal Register** before the proposal becomes final so the public can provide meaningful comments. These commenters said that the proposal deprives mine operators of the opportunity to comment, stating that they had no basis to comment on the specific criteria because the criteria were not included in the proposal. Several commenters stated that MSHA should withdraw the proposed rule and re-propose it with the specific criteria. They stated that MSHA is not establishing any criteria in the proposal, but reserving discretion to change them from time to time in the future without notice and comment. Commenters stated that the proposed rule is unclear and confusing about how much discretion MSHA would retain in deciding whether a given mine is subject to POV sanctions, and wanted to know what, if any, objective factors would guide that discretion.

Commenters stated that the specific criteria should not be a moving target, but should be fixed in the final rule so that stakeholders will know what is expected of them to avoid a pattern notice. They stated further that promising to obtain public comment before establishing specific criteria is not the same as putting the criteria in the rule and going through the notice-and-comment rulemaking process. Commenters also stated that specific numerical criteria need to be included in the rule so that they can comment on the impact of the proposal, numbers of mines affected, or costs. They stated that the OIG specifically recommended that MSHA seek stakeholder input on POV screening criteria.

Some commenters requested that MSHA include specific numbers in the final rule for how the general criteria will be measured. Other commenters suggested that MSHA not use absolute numbers as the control for the criteria—large mines should not be compared with small mines and vice versa; they stated that inspection hours provides a better basis for comparison. Some commenters stated that there is a disproportionately large number of inspection hours at large unionized mines, where miners are encouraged to point out all violations to inspectors,

and that the inspection history, in this case, reflects a safer mine not a POV.

Some commenters agreed with MSHA's proposed approach to revise the specific criteria. They stated that MSHA has many years of experience with developing POV criteria and possesses the necessary expertise to determine what specific criteria should be used to identify problem mines. They recommended that MSHA post this information in a single location on the Agency's Web site so that mine operators and other interested parties are able to view all of the relevant information at once by entering the mine ID number.

After reviewing all comments, based on Agency experience, the final rule, like the proposal, does not include specific POV criteria. This provides the Agency with necessary flexibility in establishing criteria for POV evaluations. By retaining the specific pattern of violations criteria as a statement of Agency policy, as has always been the case under the existing regulation, the Agency has flexibility to adjust the specific criteria, as necessary, to accomplish its mission and to provide relief to mine operators. Such relief might be necessary if, for example, the results of the application of the specific criteria have unintended consequences on a particular mine sector or mine size. In this case, MSHA might determine that the existing specific criteria are not fairly or properly evaluating a mine's compliance record for a pattern of violations. The Agency might determine that the existing specific criteria are no longer an appropriate measure of elevated risk to miners. If this were to occur, mine operators and miners would be unfairly impacted by inappropriate criteria. This could also have an adverse or punitive impact on mine operators. MSHA understands the importance of getting input from all of its stakeholders whenever the Agency considers revision of the specific criteria, and would provide opportunity for stakeholder input (76 FR 35801).

This aspect of the final rule is consistent with the legislative history of section 104(e), which stated that a "pattern does not necessarily mean a prescribed number of violations of predetermined standards" (S. Rep. No. 181, supra at 32–33). MSHA recognizes that a certain number of violations that might constitute a pattern at one mine may be insufficient to trigger a pattern at another.

MSHA considers the specific POV criteria to be a statement of Agency policy that is designed to provide guidance to MSHA personnel when

making POV decisions. A mine that meets the specific criteria's numerical thresholds is not automatically placed in POV status. Rather, MSHA retains the discretion to consider mitigating circumstances for each individual mine and may choose not to use the POV sanction even if a mine meets the specific criteria. Federal courts have consistently held that nonbinding statements of agency policy do not require notice and comment rulemaking (See, e.g., *Panhandle E. Pipe Line v. FERC*, 198 F.3d 266, 269 (DC Cir. 1999); see also *Center for Auto Safety, Inc. v. National Highway Traffic Safety Admin.*, 342 F.Supp.2d 1 (D.D.C. 2004)). As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a legislative rule that is subject to notice and comment (*National Mining Association v. Secretary of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009)).

C. § 104.3 Issuance of Notice

Final § 104.3 simplifies the requirements for issuing a POV notice and is essentially unchanged from the proposal. MSHA believes that it allows the Agency to more effectively implement the POV provision in a manner consistent with legislative intent. As stated earlier, some mines made initial safety improvements, however, these improvements declined over time. MSHA's experience and data reveal that some mine operators who received PPOV letters temporarily reduced their S&S violations, but reverted back to allowing the same hazards to occur repeatedly without adequately addressing the underlying causes. MSHA believes that operators who greatly reduced violations after receiving a PPOV letter and maintained this improved level of compliance are likely to continue monitoring their own performance under the final rule.

1. § 104.3(a) and (b)—Issuance and Posting of POV Notice

Final § 104.3(a), like the proposal, provides that, when a mine has a POV, the District Manager will issue a POV notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of the POV notice to the representative of miners. Final § 104.3(b) requires that the mine operator post the POV notice on the mine bulletin board and that it remain posted until MSHA terminates the POV. After the operator receives the POV notice, MSHA's web site Data Retrieval System will list the POV notice, along

with other enforcement actions, for the affected mine.

Some commenters stated that some of the data MSHA uses to screen operators for PPOV (or POV) is inaccurate, and that mine operators should have an opportunity to meet with MSHA to question underlying data after being notified of a POV. As discussed earlier, commenters were concerned that, without procedural safeguards and mine operator input, MSHA could issue a POV notice based on inaccurate data; they thought data inaccuracies were a common occurrence in the overloaded MSHA database. Commenters were also concerned that MSHA would be less inclined to conference once the POV notice was issued. To relieve these concerns, some commenters suggested that MSHA provide mine operators an informal warning and a short period of time to review data and demonstrate that the underlying violations may be invalid or otherwise flawed for purposes of POV consideration. Commenters stated that removing this informal step would result in more inaccurate POV determinations and unnecessary expenditure of resources. Some commenters suggested that MSHA provide mine operators an opportunity to present their case to the District Manager that the mine operator (1) has, or can implement immediately, a corrective action program to address the Agency's concerns; or (2) can demonstrate that, unknown to MSHA, the mine operator has been taking steps to address violations. Other commenters opposed a warning step stating that the threat of closure must be real for it to be an effective deterrent.

MSHA will continue to adhere to its policy of holding informal closeout conferences following an inspection, when the mine operator and the MSHA inspector discuss citations and orders. The operator can also request a conference with the field office supervisor or district manager.

In addition, in response to comments, and to ensure that all data are accurate, MSHA will also provide mine operators an opportunity to meet with the district manager for the limited purpose of discussing discrepancies (e.g., citations that are entered incorrectly or have not yet been updated in MSHA's computer system, Commission decisions rendered, but not yet recorded, on contested citations, and citations issued in error to a mine operator instead of an independent contractor at the mine) in the data. A mine operator may request a meeting with the District Manager for the sole purpose of presenting discrepancies in MSHA data. At this meeting, mine operators will have an

opportunity to question the underlying data on which the POV is based, and provide documentation to support their position. MSHA will make changes, as appropriate, which could result in rescission of the POV notice if MSHA verifies data discrepancies and the mine no longer meets the criteria for a POV. The time to request, schedule, and hold this meeting does not affect the 90-day schedule for abatement of the POV. In addition, consistent with existing policy, field office supervisors and district managers will continue to review all violations. This would include S&S violations issued to mine operators with a POV.

As stated previously, mine operators have the responsibility to monitor their own compliance record. MSHA encourages mine operators and contractors to monitor their compliance records using the POV on-line Monthly Monitoring Tool and notify MSHA as soon as possible if they believe any information on the POV web database is inaccurate. MSHA anticipates that operators will constantly monitor their performance using the on-line Monthly Monitoring Tool and inform the Agency of any discrepancies between their data and data posted on MSHA's Web site. Like under the existing rule, MSHA will correct inaccurate information after verifying it. MSHA believes that ongoing operator monitoring of Agency compliance data will minimize the potential for inaccurate POV determinations. The District Manager will rescind a POV notice if the Agency determines that it was based on inaccurate data and that the mine did not meet the criteria for a POV.

One commenter stated that posting the POV notice on the mine bulletin board is necessary for informing those most affected that their workplace exhibits substandard health and safety conditions so they can be attentive in protecting themselves and their fellow miners.

Under the final rule, mine operators are required to post the POV notice on the mine bulletin board and to keep it posted until MSHA terminates the POV. Additionally, the operator is required to provide a copy of the POV notice to the representative of miners.

2. § 104.3(c) and (d)—Withdrawal of Persons From Area of Mine Affected by Subsequent S&S Violations After Issuance of POV Notice

Final § 104.3(c) and (d) are the same as proposed. They restate the requirements in the Mine Act for MSHA actions after a POV notice is issued. Final § 104.3(c) requires MSHA to issue an order withdrawing all persons from

the affected area of the mine if the Agency finds any S&S violation within 90 days after the issuance of the POV notice. Final § 104.3(d) provides that if a withdrawal order is issued under § 104.3(c), any subsequent S&S violation will result in an order withdrawing all persons, except those responsible for correcting the cited condition, from the affected area of the mine until MSHA determines that the violation has been abated. Commenters stated that MSHA must clarify that a subsequent withdrawal order must apply only to persons in the specific area who are exposed to risk of harm from the cited violation.

As stated previously, MSHA considers 30 CFR part 104—Pattern of Violations—as a procedural regulation that promotes transparency. It informs mine operators and others about the steps MSHA will follow in implementing section 104(e) of the Mine Act. This final rule does not require additional compliance by mine operators. Rather, it places the primary responsibility on the mine operator and allows the mine operator to be more proactive in eliminating hazards. Through this more proactive approach, mine operators will monitor their compliance performance against MSHA records, reconcile discrepancies, and seek MSHA assistance in correcting ineffective procedures, practices, and policies. Likewise, as is existing MSHA practice, a withdrawal order usually will apply only to persons in the specific area who are exposed to risk of harm from the cited violation. MSHA, however, has the authority to withdraw miners whenever, in the judgement of the inspector at the mine, there is an imminent risk of harm to miners.

D. § 104.4 Termination of Notice

Final § 104.4 addresses the termination of a POV notice and is unchanged from the proposal. MSHA's POV Procedures Summary, posted on MSHA's Web site at <http://www.msha.gov/POV/POVsinglesource.asp>, includes provisions for MSHA to conduct a complete inspection of the entire mine within 90 days of issuing the POV notice.

Commenters expressed concern that, once a POV notice is issued, it is practically impossible to terminate, especially for large mines. Commenters said that it is highly unlikely that any operation could go 90 days without an S&S violation. One commenter pointed out that the seasonal nature of operations in Alaska makes it infeasible or impossible to conduct timely follow-up inspections.

Commenters also stated that MSHA must clarify how the Agency will handle POV status when citations or orders that form the basis for the POV status are vacated or reduced to non-S&S. Many commenters urged MSHA to set up an expedited process to review POV status if citations or orders on which the status is based are subsequently vacated or reduced in severity, in settlement or by litigation, so that the mine no longer meets the POV criteria. Many commenters stated that MSHA must terminate the POV status if the mine no longer meets the criteria for the POV status.

The requirements for termination of a POV notice are provided in section 104(e)(3) of the Mine Act. A POV notice will be terminated if MSHA finds no S&S violations during an inspection of the entire mine. Final § 104.4 merely restates the requirements at 30 U.S.C. 814(e)(3) for terminating a pattern notice. Final paragraph (b) is revised to make nonsubstantive changes to clarify that partial inspections of the mine, within 90 days, taken together constitute an inspection of the entire mine.

As previously mentioned, mine operators may challenge section 104(e) withdrawal orders, as well as the underlying POV designation, before the Commission. Section 105(b)(2) of the Mine Act provides for expedited Commission review of requests for temporary relief from the issuance of POV withdrawal orders. Under Commission procedural rules, and subject to judges' availability, it is possible for a hearing to occur as early as four days from the date of the request for an expedited hearing. For this reason, it is unnecessary for MSHA to establish a similar administrative process.

Under the statute, to be removed from POV status, a mine must receive a complete inspection with no S&S violations cited. In CY 2010, CY 2011, and the first quarter of CY 2012, MSHA conducted 48,397 regular, complete inspections. No S&S violations were cited during 26,124 (54%) of these inspections. 9,430 inspections resulted in no violations cited at all. (**Note:** for underground coal mines, for the same period, of the 5,192 regular inspections, 1,256 (24%) resulted in no S&S citations).

With respect to seasonal operations that operate on an intermittent basis, the Mine Act requires inspections for intermittent operations. As with mines that change to inactive status after receipt of a POV notice, MSHA would temporarily postpone enforcement while the mine is inactive, but would

resume POV enforcement once the seasonal operation restarts production.

E. Alternatives Suggested by Commenters

Many commenters urged MSHA to consider a mine's injury prevention effectiveness as well as enforcement performance, saying they should be given equal weight. These commenters stated that injury prevention is a core value that should be MSHA's primary focus—how well a mine prevents injuries—and that enforcement performance does not equal safety. Other commenters suggested that rates and measures must be normalized for mine size and type, stating that severity measures can skew injury rates for small mines. Some commenters suggested that MSHA use the Safety Performance Index (SPI), also known as the Grayson Model, as one viable POV model that uses injury prevention and enforcement criteria in equal measures. It normalizes the criteria and provides a holistic view (i.e., analysis of a whole system rather than only its individual components) of a mine's safety performance so that it is predictive in nature.

MSHA reviewed the SPI model when the Agency was considering changes to the specific criteria used in its POV procedures summary which provides the basis for the Agency's on-line Monthly Monitoring Tool. MSHA found that the model places a high degree of emphasis on accident and injury data reported by the mine operators, more than MSHA believed was appropriate. MSHA's existing POV criteria, however, contain elements similar to some of those in the SPI model (i.e., normalized S&S citations and orders and injury severity measures). As previously stated in this preamble, under this final rule, mine operators will have the opportunity to comment on any future POV criteria that MSHA posts for comment on its Web site at <http://www.msha.gov/POV/POVsinglesource.asp>.

IV. Regulatory Economic Analysis

MSHA has not prepared a separate regulatory economic analysis for this rulemaking. Rather, the analysis is presented below.

A. Executive Order 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order (E.O.) 12866, the Agency must determine whether a regulatory action is "significant" and subject to review by the Office of Management and Budget (OMB).

MSHA has determined that this final rule will not have an annual effect of \$100 million or more on the economy, and is not an economically "significant regulatory action" pursuant to section 3(f) of E.O. 12866. MSHA used a 10-year analysis period and a 7 percent discount rate to calculate \$6.7 million in annualized net benefits (\$12.6 million in annualized benefits minus \$5.9 million in annualized costs). However, OMB has determined that the final rule is a "significant" regulatory action because it will likely raise novel legal or policy issues.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility to minimize burden. MSHA has determined that this rule does not add a significant cumulative effect. The rule imposes requirements only on mines that have not complied with existing MSHA standards. The analysis identifies costs for mine operators who voluntarily choose to routinely monitor their citation data and undertake corrective

action programs to prevent being placed on a POV.

Commenters stated that the proposed rule failed to consider the interplay between the POV rule and other Agency rules as required by E.O. 13563, which requires agencies to regulate industry in the least burdensome manner and to take into account the costs of cumulative regulations. Commenters stated that the cumulative effect of changes to other rules, such as respirable dust, examinations, and rock dust, on the POV regulation, will likely cause an increase in the numbers of S&S citations and, consequently, could result in more mines meeting the criteria for a POV notice. In response to commenters' concerns, MSHA clarifies that this final rule will achieve the legislative intent and impact only those mines that show a disregard for miners' health and safety. This rule does not add to the number of S&S citations. Mines can avoid costs associated with POV status by complying with MSHA's health and safety standards.

B. Industry Profile and Population at Risk

The final rule applies to all mines in the United States. MSHA divides the mining industry into two major sectors based on commodity: (1) coal mines and (2) metal and nonmetal mines. Each sector is further divided by type of operation, e.g., underground mines or surface mines. The Agency maintains data on the number of mines and on mining employment by mine type and size. MSHA also collects data on the number of independent contractor firms and their employees providing mining related services. Each independent contractor is issued one MSHA contractor identification number, but may work at any mine.

In 2010, there were 14,283 mines with employees. Table 1 presents the number of mines in 2010 by type and size of mine.

TABLE 1—2010 NUMBER OF MINES, BY TYPE OF MINE AND EMPLOYMENT SIZE GROUP

Mine size	Employment size group			Total
	1–19	20–500	501+	
Underground Coal	168	383	15	566
Surface Coal	901	475	4	1,380
Underground M/NM	110	132	6	248
Surface M/NM	10,837	1,231	21	12,089
Total	12,016	2,221	46	14,283

The estimated value of coal produced in U.S. coal mines in 2010 was \$36.2

billion: \$18.8 billion from underground coal and \$17.4 billion from surface coal.

The estimated value of coal production was calculated from the amount of coal

produced and the average price per ton. MSHA obtained the coal production data from mine operator reports to MSHA under 30 CFR part 50 and the price per ton for coal from the U.S. Department of Energy (DOE), Energy Information Administration (EIA), *Annual Coal Report 2010*, November 2011, Table 28.

The value of the U.S. mining industry's metal and nonmetal (M/NM) output in 2010 was estimated to be approximately \$64.0 billion. Metal mining contributed an estimated \$29.1 billion to the total while the nonmetal mining sector contributed an estimated \$34.9 billion. The values of production estimates are from the U.S. Department

of the Interior (DOI), U.S. Geological Survey (USGS), *Mineral Commodity Summaries 2011*, January 2011, page 8.

The combined value of production from all U.S. mines in 2010 was \$100.2 billion. Table 2 presents the estimated revenues for all mines by size of mine.

TABLE 2—2010 REVENUES AT ALL MINES BY EMPLOYMENT SIZE GROUP

Size of mine	Revenues— coal mines (millions)	Revenues— MNM mines (millions)	Total revenues (millions)
1–19 Employees	\$224	\$14,800	\$15,000
20–500 Employees	15,100	43,300	58,400
501+ Employees	20,900	5,900	26,800
Total*	36,200	64,000	100,200

* Discrepancies are due to rounding.

C. Benefits

This final rule provides MSHA a more effective use of its POV tool to ensure that operators improve their compliance with existing health and safety standards. Based on 2010 mine employment data, effective use of this enforcement tool will provide improvement in the conditions for 319,247 miners. These workers are found in underground coal mines (51,228), surface coal mines (70,178), underground metal/nonmetal mines (22,930), and surface metal/nonmetal mines (174,911).

The Agency used its experience under the existing POV rule to estimate benefits under the final rule. Specifically, the Agency used safety results derived after PPOV notices were issued to mine operators. MSHA's data reveal that improvements declined over time at about a fifth of the mines that received PPOV notices, based on MSHA's data over the last four years.

Beginning in June 2007 through September 2009, MSHA conducted seven cycles of PPOV evaluations, on an average of every 6 to 9 months. In each cycle, eight to 20 of all mines met the criteria for issuance of a PPOV. During that period, MSHA sent 68 PPOV letters to 62 mine operators (six mine operators received more than one notification). After receiving the PPOV, 94 percent of the mines that remained in operation to the next evaluation reduced the rate of S&S citations and orders by at least 30 percent, and 77 percent of the mines reduced the rate of S&S citations and orders to levels at or below the national average for similar mines. These improvements declined over time at some mines. Compliance at 21 percent ($13/62 = 0.21$) of the 62 mines that

received PPOV letters deteriorated enough over approximately a 24-month period to warrant a second PPOV letter. Six of these mines were actually sent a second PPOV letter, while the other seven (of the 13) could have received a second letter but did not, generally due to mitigating circumstances.

In the proposed rule, MSHA estimated that 50 mines would submit corrective action programs in the first year. After reviewing public comments on the proposed rule, the Agency performed a POV analysis to review the 12-month violation history of all active mines for each of the five months from September 2011 to January 2012. The analysis used the existing PPOV screening criteria except for the final order criteria. Of the over 14,000 mines under MSHA jurisdiction, MSHA identified 313 mines that either met all of the initial screening criteria or all but one of the initial screening criteria. MSHA believes that most mine operators in this situation will submit and implement corrective action programs. MSHA believes that almost 90 percent (or 275) of these mines will submit corrective action programs in the first year under the final rule. MSHA believes operators will improve compliance over time but lacks any historical basis for a data driven estimate. Rather, the Agency selected a 10-percent reduction each year as a reasonable assumption based on its data and experience with the issuance of PPOV notices under the existing regulation. The costs for the corrective action programs include this 10-percent reduction each year in operators submitting corrective action programs.

Under the final rule, operators can submit corrective action programs as evidence of mitigating circumstances to

demonstrate their commitment to improve health and safety at their mines. Mines who submit effective corrective action programs will reduce the number of S&S violations, thereby reducing the probability of injuries and of being placed on a POV. MSHA reviewed the five 12-month periods ending on September 30, 2011; October 31, 2011; November 30, 2011; December 31, 2011; and January 31, 2012, which resulted in an average of 12 mines that met all of the POV screening criteria. Based on this data, MSHA projects that 12 mines will meet all of the POV criteria in the first year under the final rule. As previously stated, of the 90 percent or 11 mines that implement a corrective action program, MSHA estimates that 80 percent will successfully reduce S&S violations. Therefore, 20 percent or two of the mines that implement a corrective action program will be issued a POV notice, primarily because they did not successfully implement a corrective action program or the corrective action program did not achieve the results intended in reduced S&S citations to avoid a POV. MSHA further estimates that 10 percent or one mine will not have implemented a corrective action program and will be issued a POV notice. Therefore, MSHA estimates that a total of three mines will be issued POV notices annually.

MSHA estimated the impact that the final mitigating circumstances provision in the final rule (including the opportunity for mine operators to submit corrective action programs) will have on the number of nonfatal injuries at mines. MSHA determined that the 62 mines, which received PPOV letters from June 2007 through September

2009, experienced 11 total nonfatal injuries during the year prior to receiving the PPOV letter and eight total nonfatal injuries during the year after receiving the PPOV letter, for an overall reduction in nonfatal injuries of 30 percent per year.

One commenter stated that MSHA had provided no rational basis for its estimate that the proposed rule would reduce the number of nonfatal injuries per mine by an average of three per year. In response to the comment, MSHA's estimate for reduced non-fatal injuries per year in the proposed rule was based on Agency experience under the existing rule. However, MSHA has reduced the estimate of non-fatal injuries avoided per year from three in the proposed rule to one in the final rule.

MSHA reviewed 10 years of accident data for all mines using the Agency's Open Government Initiative Accident Injuries dataset at <http://www.msha.gov/OpenGovernmentData/DataSets/Accidents.zip>. MSHA examined data from 2002 to 2011. For the mines with accidents, MSHA found that the average number of nonfatal, non-permanently disabling injuries with lost time was 3.7 annually per mine. Using an average of 3.7 injuries per mine annually and MSHA's experience with PPOV (roughly a 30 percent reduction in non-fatal injuries), MSHA reduced its estimate for nonfatal injuries avoided at mines that successfully implement an effective, MSHA-approved, corrective action program, from three to one per year. MSHA has included a more conservative value in the final rule. It is likely that operators who include measurable benchmarks for abating specific violations to address hazardous conditions in the MSHA-approved corrective action programs will achieve more effective systemic results than those achieved under the existing rule. As mentioned previously in the preamble, MSHA believes that the POV will be a more effective deterrent to operators by encouraging them to continually evaluate their compliance performance and respond appropriately.

MSHA does not believe that it has a reliable basis on which to quantify a reduction in fatalities or disabling injuries. MSHA believes, however, that the implementation of an MSHA-approved corrective action program will reduce fatalities and disabling injuries. Although MSHA has not quantified a reduction in injuries at the three mines estimated to be placed on a POV each year, the Agency believes that there will likely be injury reductions at these mines.

In the first year following receipt of the PPOV, mines receiving PPOV letters showed reductions in S&S violations and injuries. Unfortunately, some mines failed to sustain these improvements in the second year. Of the 62 mines receiving PPOV letters from June 2007 through September 2009, 49 mines had two full years of data following receipt of the PPOV letter. Of these 49 mines, 19 (39%) experienced an increase in the number of injuries in the second year following receipt of the PPOV letter compared to the first.

MSHA expects that, under the final rule, more mines will sustain improvements in health and safety. MSHA expects that operators that proactively implement effective MSHA-approved corrective action programs will have health and safety systems that allow them to continuously monitor hazardous conditions and sustain improvements. Mines that meet the conditions for termination of a POV will have increased incentive to remain off (see the cost analysis) and will likely implement continuing, proactive measures to prevent S&S violations.

MSHA based its estimates of the monetary values for the benefits associated with the final rule on the work of Viscusi and Aldy (2003). Viscusi and Aldy's work on willingness-to-pay is widely recognized and accepted by the Department of Labor and other federal agencies. Viscusi and Aldy conducted an analysis of studies that use a willingness-to-pay methodology to estimate the value of life-saving programs (i.e., meta-analysis) and found that each fatality avoided was valued at approximately \$7 million and each lost work-day injury was approximately \$50,000 in 2000 dollars. Using the Gross Domestic Product (GDP) Deflator (U.S. Bureau of Economic Analysis, 2010), this yields an estimate of \$8.7 million for each fatality avoided and \$62,000 for each lost work-day injury avoided in 2009 dollars. As a conservative estimate, MSHA has used the lost work-day injury value for all nonfatal injuries as there is insufficient data to separately estimate permanently disabling injuries.

MSHA recognizes that willingness-to-pay estimates involve some uncertainty and imprecision. Although MSHA is using the Viscusi and Aldy (2003) study as the basis for monetizing the expected benefits of the final rule, the Agency does so with several reservations, given the methodological difficulties in estimating the compensating wage differentials (see Hintermann, Almerini, and Markandya, 2008). Furthermore, these estimates pooled across different industries may not capture the unique

circumstances faced by miners. For example, some have suggested that the models be disaggregated to account for different levels of risk, as might occur in coal mining (see Sunstein, 2004). In addition, miners may have few options of alternative employers and, in some cases, only one employer (near-monopsony or monopsony) that may depress wages below those in a more competitive labor market.

MSHA estimates a reduction of 1,796 injuries over the 10-year period. This value is based on the estimated prevention of 275 nonfatal injuries in year one (first year 275 mines with corrective action programs times 1 injury reduction per mine) and a 10 percent reduction in mines submitting programs and corresponding reduction in non-fatal injuries in each successive year. This reduction results in an estimated 107 mine operators submitting programs in the 10th year. The monetized benefits are calculated by multiplying the reduction in each year by \$62,000 per lost work-day injury. This reduction in injuries, due to this final rule, will result in a 10-year monetary benefit of \$111.4 million which when annualized at 7 percent equals \$12.6 million. MSHA believes that this is a low estimate for the total benefits of the final rule as no monetary benefit for potential avoided fatalities was included and avoided injuries were all assumed to be less serious than a disabling injury.

D. Compliance Costs

MSHA estimates this rule will result in total compliance costs of \$54.4 million over 10 years. The total 10-year estimated costs are comprised of costs for monitoring compliance or enforcement data (\$11.6 million), costs for developing and submitting corrective action programs (\$20.1 million), and lost production when a POV and withdrawal order are issued (\$22.7 million). The costs, when annualized at 7 percent, are \$5.9 million. These costs are described below. MSHA's estimates do not include the cost of compliance with MSHA's health or safety standards. Although these costs can be substantial, they are addressed in rulemakings related to MSHA's existing health and safety standards, and are not included in this analysis.

The final rule mirrors the statutory provision in section 104(e) of the Mine Act for issuing a POV notice. Final § 104.3(c) provides that MSHA will issue an order withdrawing all persons from the affected area of the mine if any S&S violation is found within 90 days after the issuance of a POV notice. No

one will be allowed to enter the area affected by the violation until the condition has been abated, except for those persons who must enter the affected area to correct the violation. Under final rule § 104.3(d), any subsequent S&S violation will also result in a withdrawal order.

The Congress intended that the POV tool be used to cause operators of unsafe mines to bring them into compliance, even if this meant shutting down production. Withdrawal orders issued under the final rule can stop production until the condition has been abated. The threat of a withdrawal order provides a strong incentive for mine operators to ensure that S&S violations do not recur. MSHA expects that, rather than risking a POV and the possibility of a closure, mine operators will monitor their compliance record against the POV criteria using the on-line Monthly Monitoring Tool on the Agency's Web site. MSHA estimates that it will take a supervisor an average of 0.08 hour (5 minutes) each month to monitor a mine's performance using the Agency's on-line Monthly Monitoring Tool.

Commenters both supported and disagreed with the time, ease of use, and frequency associated with monitoring the on-line Monthly Monitoring Tool referenced in the proposed rule. Commenters stated that MSHA's estimate of 5 minutes to monitor the Web data was too low. Besides the time required for monitoring, commenters also stated concern about the ease of use of MSHA's on-line Monthly Monitoring Tool.

After reviewing the comments, MSHA has determined that, due to the broad range in mine sizes and types affected by this rule, an average of 5 minutes per month is an appropriate time for an operator to monitor a mine's compliance performance. Some large mines may take much longer; many mine operators may monitor the on-line Monthly Monitoring Tool only a few times a year and incur lower costs. Mine operators may also request this information directly from MSHA. As support for its estimates, MSHA believes that its on-line Monthly Monitoring Tool can be easily used by mine operators and without the need for special skills or training.

MSHA calculated the average supervisory wage, including benefits, for all mining in 2010 at \$81.27 per hour. MSHA estimates that the yearly cost for all mine operators to monitor their performance will be approximately \$1.1 million (14,283 mines $\times$ 0.08 hours (5 minutes) per month $\times$ 12 months per year $\times$ \$81.27 per hour).

With respect to compliance performance, MSHA's experience reveals that the vast majority of mines operate substantially in compliance with the Mine Act. As mentioned above, MSHA identified 313 mines that either met all or all but one of the initial screening criteria. MSHA projects that almost 90 percent of these 313 mines (or 275) will submit corrective action programs in the first year under the final rule. Under the final rule, MSHA projects that these 275 operators, after monitoring their compliance performance, will submit corrective action programs to MSHA as evidence of mitigating circumstances to demonstrate their commitment to improve their compliance performance. MSHA estimates that mine operators will improve their compliance performance and the number of corrective action programs will gradually decrease. After the final rule becomes effective, MSHA projects increased compliance and applied a 10 percent reduction per year to the number of mines submitting corrective action programs. This results in an estimated 107 submissions in year 10.

MSHA estimates that, on average, it will take a total of 128 hours of a supervisor's time to develop an effective corrective action program with meaningful and measurable benchmarks, obtain the Agency's approval of the program, and implement the program. The 128 hours of supervisory time is comprised of 80 hours for development of the program, 8 hours for submittal and approval, and 40 hours for implementation. MSHA estimates that 8 hours of miners' time will be associated with implementation of the program. MSHA re-evaluated and reduced the estimated hours based on public comments. The cost for any copying and mailing of the corrective action program documents and revisions will be about \$100.

The final rule applies to all mines. Because underground coal mines generally receive more S&S violations (50% of all S&S violations in 2011) than other types of mines, MSHA projects that the final rule will affect underground coal mines more than any other mining sector. From June 2007 through November 2011, underground coal mine operators received nearly 80 percent of the PPOV letters. MSHA used the 2010 underground coal mine hourly wage rates, including benefits, of \$84.69 for a supervisor and \$36.92 for a miner to estimate the corrective action program costs.

MSHA received a public comment that individual mines had different wage rates. MSHA recognizes that

wages, and therefore costs, will vary across mines, with some higher and some lower than the average. This evaluation uses average underground coal mine wage rates to estimate the overall costs. Since hourly wage rates in underground coal mining are higher than those in surface coal and metal/nonmetal mining, MSHA believes this approach may overestimate the costs.

In the final rule, MSHA clarified that the corrective action programs that mine operators may submit to MSHA for consideration as mitigating circumstances will not need to be comprehensive in nature. The corrective action programs referenced in the final rule need to cover only health and safety issues reflected in the citations and orders that result in a POV. The costs related to the proposed rule were based on a comprehensive safety and health program, which would be more extensive and address all health and safety issues at the mine and involve more extensive miner participation to develop. With this clarification, MSHA estimates that the costs to develop the corrective action program will be \$11,200, as opposed to \$22,100 in the proposed rule. The revised average cost to develop and implement an approved corrective action program at a mine will be approximately \$11,200 ((128 hours of a supervisor's time $\times$ \$84.69 per hour) + (8 hours of miners' time $\times$ \$36.92 per hour) + \$100). MSHA anticipates that the cost to mine operators developing and implementing an MSHA-approved corrective action program will be approximately \$20.1 million over 10 years (1,796 mines develop and implement program $\times$ \$11,200 per mine).

Several commenters provided estimates of \$14,000–\$44,000 per hour of shutdown at large mines. These commenters suggested that shutdowns would be from 4 hours to 2 days and the number of citations could raise costs by between \$3.5 and \$7 million per year. MSHA does not have an historical basis from which to estimate the potential costs that will be incurred by a mine on POV. MSHA believes that a reasonable estimate of shutdown costs is the potential production lost when miners are withdrawn while the mine operator takes the necessary actions to correct the health and safety violations. Lost revenue due to the withdrawal orders will vary considerably.

As noted above, MSHA expects that the final rule will affect underground coal mining more than any other mining sector. MSHA, therefore, used underground coal mine revenue to estimate potential production losses. In 2010, 566 underground coal mines

generated an estimated \$18.8 billion in revenue resulting in an average of approximately \$33.2 million per mine. Average underground coal mine revenue per day is estimated at \$151,000 (\$33.2 million/220 work days).

The majority of the S&S violations issued in underground coal mines are abated immediately, or within hours, and have no impact on production. A smaller percentage of violations may take an extended period of time and will impact production. Based on MSHA experience, the Agency estimates an average of 5 days lost production for a mine on POV. MSHA estimates the cost of lost production at \$755,000 (\$151,000 lost revenue per day $\times$ 5 days). Based on the 3 mines per year that MSHA estimates will be placed on a POV, the total annual lost revenue is estimated at \$2.3 million. Some mines may incur greater than average losses while others may incur less than average losses. The small number of large mines relative to the number of small mines would result in a lower overall cost than those suggested by commenters.

The rule does not require that every S&S violation result in a shutdown of the entire mine. Only miners from the affected area are withdrawn. Withdrawal of miners does not always result in a loss of production.

Since the average revenue per underground coal mine (\$33.2 million) is significantly higher than the average revenue produced by all mines (\$7.0 million), MSHA believes this approach may overstate the estimated costs.

E. Net Benefits

Under the Mine Act, MSHA is not required to use estimated net benefits as the basis for its decision to promulgate a rule. Based on the estimated prevention of 1,796 nonfatal injuries over 10 years, MSHA estimates that the final rule will result in annualized (7%) monetized benefits of \$12.6 million. The 10-year annualized (7%) costs are \$5.9 million. The net benefit is approximately \$6.7 million per year.

V. Feasibility

MSHA has concluded that the requirements of the pattern of violations final rule are technologically and economically feasible.

A. Technological Feasibility

MSHA concludes that this final rule is technologically feasible because it is not technology-forcing. In order to avoid a POV, mine operators will have to comply with existing MSHA health and safety standards, which have previously been determined to be technologically feasible.

B. Economic Feasibility

MSHA also concludes that this final rule is economically feasible because mine operators can avoid the expenses of being placed on a POV by complying with MSHA's existing health and safety standards, all of which have previously been found to be economically feasible. For those mine operators who are in danger of a POV, MSHA will consider the implementation of an approved corrective action program, among other factors, as a mitigating circumstance. MSHA expects about three mines per year will incur the potential expenses associated with closures while on a POV.

MSHA has traditionally used a revenue screening test—whether the yearly compliance costs of a regulation are less than one percent of revenues—to establish presumptively that compliance with the regulation is economically feasible for the mining community. Based on this test, MSHA has concluded that the requirements of the final rule are economically feasible. The first year compliance cost to mine operators is the highest year at \$6.5 million. This is insignificant compared to total annual revenue of \$100.2 billion for the mining industry (i.e., costs are significantly less than one percent). Each year beyond the first year has lower total costs and, therefore, even less economic impact. Even if all of the costs were borne by the underground coal industry, the estimated \$6.5 million first year cost of the final rule is about 0.03 percent of the underground coal industry's 2010 revenue of \$18.8 billion. MSHA, therefore, concludes that compliance with the provisions of the final rule will be economically feasible for the mining industry.

VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA has analyzed the impact of the final rule on small businesses. Based on that analysis, MSHA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and made the certification under the RFA at 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is presented below.

A. Definition of a Small Mine

Under the RFA, in analyzing the impact of the final rule on small

entities, MSHA must use the SBA definition for a small entity or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. MSHA has not taken such an action and is required to use the SBA definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees.

In addition to examining small entities as defined by SBA, MSHA has also looked at the impact of this final rule on mines with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as small mines. These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. The costs of complying with the final rule and the impact of the final rule on small mines will also be different. It is for this reason that small mines are of special concern to MSHA.

MSHA concludes that it can certify that the final rule will not have a significant economic impact on a substantial number of small entities that will be covered by this final rule. The Agency has determined that this is the case both for mines with fewer than 20 employees and for mines with 500 or fewer employees.

B. Factual Basis for Certification

Mine operators can avoid the expenses of being placed on a POV by complying with existing MSHA health and safety standards. Under the final rule, MSHA may consider the implementation of a corrective action program, coupled with improved compliance levels, as a mitigating circumstance for those mine operators who are subject to being placed on a POV. MSHA expects few mines, if any, will choose to incur the potential expenses associated with closures under a POV.

MSHA initially evaluates the impacts on small entities by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated compliance costs are less than one percent of the estimated revenues, the Agency believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. When estimated compliance costs exceed one percent of revenues, MSHA investigates whether a further analysis

is required. Since it was not possible to accurately project the distribution of mines that will incur the estimated \$6.5 million to comply with the final rule by

commodity and size, MSHA examined the impact using several alternative assumptions as a sensitivity or threshold analysis.

If the total estimated compliance cost of \$6.5 million were incurred by small mines, the impact would be as summarized below.

Small mine group	Number of mines	Revenue (millions)	Cost as percent of revenue
MSHA Definition (1–19 employees)	12,016	\$15,000	0.04
SBA Definition ($\leq$ 500 employees)	14,237	73,400	0.01

The final rule, therefore, will not have a significant economic impact on a substantial number of small mining operations.

One commenter stated that the average cost of the rule, as calculated by MSHA for the typical mine, would likely put some small mines, especially placer gold mines, out of business. The cost for such small mines, which typically employ one to three miners, is likely to be less than the average cost that MSHA calculated for an average-sized small mine. For example, a corrective action program would require fewer hours to develop and implement.

Accordingly, MSHA has certified that the final rule will not have a significant economic impact on a substantial number of small entities.

VII. Paperwork Reduction Act of 1995

A. Summary

This final rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA).

MSHA estimates that under the final rule approximately 275 mines will develop and implement MSHA-approved corrective action programs in the first year. MSHA believes this number will decrease by 10 percent in each subsequent year. The average number of mines that will develop and implement MSHA-approved corrective action programs per year over 3 years is 249 $((275 + 248 + 223)/3)$. The development and MSHA approval of a corrective action program will impose information collection requirements related to mitigating circumstances under final § 104.2(a)(8).

MSHA expects that developing such a program with meaningful and measurable benchmarks will take about 128 hours of a supervisor's time and 8 hours of miners' time. Costs for copying and mailing the program and revisions are estimated to be \$100 per program.

The burden of developing and implementing an approved corrective action program is 136 hours per mine $(128 + 8)$ plus an additional cost of \$100 per mine for copying and mailing.

Burden Hours:

- Supervisors: 249 mines $\times$ 128 hr/mine = 31,872 hr
- Miners: 249 mines $\times$ 8 hr/mine = 1,992 hr

Burden Hour Costs:

- 31,872 hr $\times$ \$84.69/hr = \$2,699,240
- 1,992 hr $\times$ \$36.92/hr = \$73,545

Copying and Mailing Costs:

- 249 mines $\times$ \$100/mine = \$24,900

Total Burden Cost: \$2,797,685.

B. Procedural Details

The information collection package for this final rule has been submitted to OMB for review under 44 U.S.C. 3504(h) of the Paperwork Reduction Act of 1995, as amended (44 U.S.C. 3501 et seq.).

A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

The Department has submitted the information collections contained in this final rule for review under the PRA to the OMB. The Department will publish an additional Notice to announce OMB's action on the request and when the information collection requirements will take effect. The regulated community is not required to respond to any collection of information unless it displays a current, valid, OMB control number. MSHA displays the OMB control numbers for the information collection requirements in its regulations in 30 CFR part 3.

VIII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the final rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.). MSHA has determined that this final rule will not include any federal

mandate that may result in increased expenditures by State, local, or tribal governments; nor will it increase private sector expenditures by more than \$100 million (adjusted for inflation) in any one year or significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further Agency action or analysis.

B. Executive Order 13132: Federalism

This final rule will not have federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, under E.O. 13132, no further Agency action or analysis is required.

C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that this final rule will have no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children. This final rule impacts only the mining industry. Accordingly, MSHA certifies that this final rule will not impact family well-being.

One commenter stated that if mines are put out of business because they cannot pay MSHA fines, then lack of jobs would put families and children into poverty. As explained above, MSHA has concluded that compliance with the provisions of the final rule will be economically feasible for the mining industry. This final rule will not impose additional compliance costs on the mining industry, thus, it will not put mines out of business.

D. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

The final rule will not implement a policy with takings implications. Accordingly, under E.O. 12630, no further Agency action or analysis is required.

E. Executive Order 12988: Civil Justice Reform

This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. Accordingly, this final rule will meet the applicable standards provided in section 3 of E.O. 12988, Civil Justice Reform.

F. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This final rule will have no adverse impact on children. Accordingly, under E.O. 13045, no further Agency action or analysis is required.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule will not have tribal implications because it will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Accordingly, under E.O. 13175, no further Agency action or analysis is required.

One commenter asserted that the rule could have impacts on Alaska Regional and Village Corporations that have royalty agreements with mining companies. Within E.O. 13175 guidelines, effects on royalties are not considered a direct effect of the rule and, therefore, they are not included.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action (i.e., it adversely affects energy supply, distribution, or use). MSHA has reviewed this final rule for its energy effects because the final rule applies to the coal mining sector. Even if the entire annualized cost of this final rule of approximately \$5.9 million were

incurred by the coal mining industry, MSHA has concluded that, relative to annual coal mining industry revenues of \$36.2 billion in 2010, it is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, under this analysis, no further Agency action or analysis is required.

I. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has reviewed the final rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined and certified that the final rule will not have a significant economic impact on a substantial number of small entities.

IX. References

- Hintermann, B., A. Alberini, and A. Markandya (2010). "Estimating the Value of Safety with Labor Market Data: Are the Results Trustworthy?" *Applied Economics*, 42(9):1085–1100. Published electronically in July 2008.
- Sunstein, C. (2004). "Valuing Life: A Plea for Disaggregation." *Duke Law Journal*, 54(November 2004):385–445.
- U.S. Bureau of Economic Analysis (2010). "National Income and Product Accounts Table: Table 1.1.9. Implicit Price Deflators for Gross Domestic Product" [Index numbers, 2005 = 100]. Revised May 27, 2010. <http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=13&Freq=Qtr&FirstYear=2006&LastYear=2008>
- U.S. Department of Labor, Office of the Inspector General. "In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority," Report No. 05–10–005–06–001 (September 29, 2010).
- Viscusi, W. and J. Aldy (2003). "The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World," *Journal of Risk and Uncertainty*, 27:5–76.

List of Subjects in 30 CFR Part 104

Administrative practice and procedure, Law enforcement, Mine safety and health, Reporting and recordkeeping requirements.

Dated: January 17, 2013.

Joseph A. Main,

Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977 as amended by the Mine Improvement and New Emergency Response Act of 2006, MSHA is amending chapter I of title 30 of the Code of Federal Regulations by revising part 104 to read as follows:

PART 104—PATTERN OF VIOLATIONS

Sec.

- 104.1 Purpose and scope.
- 104.2 Pattern criteria.
- 104.3 Issuance of notice.
- 104.4 Termination of notice.

Authority: 30 U.S.C. 814(e), 957.

§ 104.1 Purpose and scope.

This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the health and safety of miners. The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines.

§ 104.2 Pattern criteria.

(a) At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:

- (1) Citations for S&S violations;
- (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
- (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Mine Act;
- (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and

(8) Mitigating circumstances.

(b) MSHA will post the specific pattern criteria on its Web site.

§ 104.3 Issuance of notice.

(a) When a mine has a pattern of violations, the District Manager will issue a pattern of violations notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of this notice to the representative of miners.

(b) The mine operator shall post the pattern of violations notice issued under this part on the mine bulletin board. The pattern of violations notice shall remain posted at the mine until MSHA terminates it under § 104.4 of this part.

(c) If MSHA finds any S&S violation within 90 days after issuance of the pattern notice, MSHA will issue an order for the withdrawal of all persons from the affected area, except those persons referred to in section 104(c) of the Mine Act, until the violation has been abated.

(d) If a withdrawal order is issued under paragraph (c) of this section, any subsequent S&S violation will result in a withdrawal order that will remain in effect until MSHA determines that the violation has been abated.

§ 104.4 Termination of notice.

(a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations or if MSHA does not issue a withdrawal order in accordance with section 104(e)(1) of the Mine Act within 90 days

after the issuance of the pattern of violations notice.

(b) The mine operator may request an inspection of the entire mine or portion of the mine. MSHA will not provide advance notice of the inspection and will determine the scope of the inspection. Inspections of portions of the mine, within 90 days, that together cover the entire mine shall constitute an inspection of the entire mine for the purposes of this part.

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